NO. 48384-0

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, APPELLANT

v.

DARCUS ALLEN, RESPONDENT

Appeal from the Superior Court of Pierce County
The Honorable Katherine M. Stolz

No. 10-1-00938-0

STATE'S REPLY TO RESPONDENT'S BRIEF

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A. STATE'S REPLY TO ISSUES RAISED BY RESPONDENT.

1. This Court should reject defendant's untimely effort to modify the decision enabling this Court to correct a plain error of law that deprived the people of our State their right to secure a mandatory life sentence against him for each police officer he helped Maurice Clemmons murder.

2. Defendant's time-barred invocation of collateral estoppel to prevent correction of the erroneous dismissal of his RCW 10.95 sentencing factors is meritless, for there is no final judgment or unanimous special verdict against those factors to which that doctrine of judicial economy could apply.

3. The challenged ruling violated binding state Supreme Court precedent that double jeopardy protection does not apply to RCW 10.95's sentencing factors in noncapital cases.

B. ARGUMENT IN SUPPORT OF STATE'S REPY.

1. THIS COURT SHOULD REJECT DEFENDANT'S UNTIMELY RAP 17.7 MOTION TO MODIFY THE RULING THAT MOST PROVIDENTLY ENABLED THIS COURT TO CORRECT AN ERROR OF LAW WHICH DEPRIVED THE PEOPLE OF WASHINGTON THEIR RIGHT TO SECURE A MANDATORY LIFE SENTENCE AGAINST HIM FOR EACH POLICE OFFICER HE HELPED MAURICE CLEMMONS MURDER.

A Police Officer is killed.

> Few crimes are so shocking to society as the murder of a police officer in the performance of his [or her] duty. This duty ... is the protection of society against evil doers. Civilization's pattern long has conferred this authority on a body of picked employed men [and women] who are the people's representatives. The badges of authority they wear and the laws they are charged with enforcing originate from the democratic process. For these reasons an attack on a police officer is regarded by any organized society as an attack on itself and when a polic[e] [officer] is killed in such an attack the crime is widely regarded as not so much against a person as against society as a whole.

People v. Carter, 56 Cal.2d 549, 571, fn.8, 364 P.2d 477 (1961); *see also* RCW 10.95.020(1); ***State v. Korn***, 63 Wn.App. 688, 694, 821 P.2d 1248 (1992). "Courage, a sense of duty, and a willingness to make personal sacrifices are among the many ... characteristics required of members of our domestic security forces, the 'Thin Blue Line' upon which our public safety depends." ***Wiggs v. Edgecombe Cty.***, 361 N.C. 318, 320, 643 S.E.2d 904 (2007).

a. This court should not revisit the ruling that granted review because defendant did not file a motion for modification as required by RAP 17.7.

A party dissatisfied with the commissioner's ruling on a RAP 2.3 motion for discretionary review must move for modification of the ruling under RAP 17.7, which provides:

> An aggrieved person may object to a ruling of a commissioner ... only by a motion to modify the ruling directed to the judges of the court served by the commissioner.... The motion to modify the ruling must be served on all persons entitled to notice of the original motion and filed in the appellate court not later than 30 days after the ruling is filed....

But "[i]f an aggrieved party fails to seek modification ... within the time permitted by RAP 17.7, the ruling becomes a final decision of this court." ***Det. of Broer v. State***, 93 Wn.App. 852, 857, 957 P.2d 281 (1998)(citing ***Kramer v. J.I. Case Mfg. Co.***, 62 Wn.App. 544, 547, 815 P.2d 798 (1991); ***Gould v. Mutual Life Ins. Co.***, 37 Wn.App. 756, 758, 683 P.2d 207 (1984)) *amended on denial of reconsideration sub nom.* ***Broer v. State***, 973 P.2d 1074 (1999). The ruling should stand and this Court should confine itself to deciding the appeal on its merits. *Id.*; ***Hough v. Ballard***, 108 Wn.App. 272, 277, 31 P.3d 6 (2001); RAP 17.7; 2A Wash. Prac., RAP 2.3 (7th ed.); 3 Wash. Prac., RAP 17.7 (7th ed.); ***Spokane v. Marquette***, 103 Wn.App. 792, 14 P.3d 832 (2001) *rev'd on other grounds*, 146 Wn.2d 124, 43 P.3d 502 (2002).

The ruling that granted review issued March 28, 2016. Defendant did not file a RAP 17.7 motion for modification.[1] His time for seeking modification expired April, 28, 2016. The request for modification made in Respondent's brief of October 4, 2016, is time-barred. Reaching the merits of this appeal is the only certain way the trial court's status-quo altering error of law can be corrected.

b. The ruling should be affirmed for it enabled correction of a legal error that deprived the public its right to secure a mandatory life sentence against defendant for each of four officers he helped murder.

The State in a criminal case has a limited right to appeal. RAP 2.2(b). Erroneous pretrial dismissal of RCW 10.95.020 sentencing factors can only be corrected through discretionary review or cross-appeal. *Id.*; RAP 5.1. Neither of which is guaranteed as both turn on variables beyond the State's control. Review is providently granted under RAP 2.3(b)(2) if RCW 10.95 sentencing factors are dismissed due to a probable error of law, for their dismissal substantially limits the State's freedom of action by eliminating its capacity to secure a sentence of mandatory life or death in for aggravated acts of premeditated murder. *See* RCW 10.95; *see also* ***Hartley v. State***, 103 Wn.2d 768, 773, 698 P.2d 77 (1985); ***State v. Lee***, 158 Wn.App. 513, 516, 243 P.3d 929 (2010); ***State v. Haydel***, 122 Wn.App. 365, 370, 95 P.3d 760 (2004).

[1] ER 201; ACORDS Case# 483840.

This Court understands the trial court's error of law:

> [] Both the United States Supreme Court and our Supreme Court have held ... double jeopardy is applicable in the capital sentencing context, but not in noncapital sentencing proceedings. ... [T]he trial court's reliance on *Alleyne* is misplaced.... *Alleyne* is an extension of the *Apprendi* line of cases .... Our Supreme Court has explicitly stated the *Apprendi* rule is "for the purposes of the Sixth Amendment and that the *Apprendi* line of cases do not impact double jeopardy analysis under the Fifth Amendment...." The trial court committed probable error in concluding ... *Alleyne* extended to double jeopardy analysis of aggravating factors in noncapital cases....

CP 181-88. Also clear is a significant status-quo alerting effect:

> [T]rial court's decision substantially altered the status quo because [an interlocutory appeal] is the State's only sure opportunity to seek review of the trial court's decision.

CP 187.

Defendant's arguments against review are irreconcilable with long established double jeopardy precedent. They betray lack of due regard for RCW 10.95's purpose of empowering society to adequately punish and deter certain types of premeditated murder that our Legislature identified as placing society in the greatest peril. Murders striking at the rule of law. Murders targeted at police, judges, jurors, witnesses, first responders and other human instruments of government. Murders purchased to eliminate competitors or for advancement within criminal syndicates that can quickly grow to vie with our society for supremacy. RCW 10.95.020(1), (4), (6), (8); *e.g.*, ***United States v. Orena***, 32 F.3d 704 (2nd Cir. 1994).

The challenged dismissal deprived the jury at retrial its capacity to decide if defendant knew he was assisting in the premediated murder of four officers engaged in official police duties. RCW 10.95.020(1). Which in turn deprived the people their right to secure a mandatory life sentence against him for crimes targeted at the society on which all depend. It is a status-quo altering loss for which no certain means of correction exists. Cross-appeal is unavailable if defendant foregoes appealing reconviction to avoid the aggravators' reinstatement. Discretionary review after retrial could not restore the status quo, for reinstatement then would require the enormous societal cost of a third jury to decide them at a post-conviction hearing. Conviction for lesser offenses, or acquittal, would forever insulate the trial court's status-quo altering error of law from review. But unsound dismissals of RCW 10.95 aggravators are too societally important to leave unaddressed. For the beneficiaries of such dismissals could only be those there is probable cause to believe committed the most strikingly heinous, societally-destabilizing acts of premediated murder recognized by our law. Correction now enables the aggravators to be efficiently decided by one jury at the pending retrial.

Yet defendant says there is no difference in his exposure before or after the challenged dismissal as he has but one life to live and conviction as currently charged would likely result in the functional equivalent of a life sentence for someone his age. But his opposition to the reinstatement of the RCW 10.95 aggravators indirectly expresses appreciation for the

windfall he received. His next tell shows in the unsound way he presents as the ruling's only affect the difference between a mandatory life sentence and the sentence attending conviction on four counts of firearm enhanced premeditated murder. Omitted from that presentation are all the possible alternatives. Acquittal on all but one premeditated murder count without a firearm enhancement would carry a far more lenient sentence absent a RCW 10.95 aggravator. His range would be 338-450 months, which even discounting the availability of a downward departure carries a possibility for him of enjoying life beyond prison. CP 195. Conviction for the lesser included offense of second degree murder on the remaining three counts would not necessarily result in a less favorable outcome for him as SRA sentences can be reduced below presumptive ranges as well as run concurrently. RCW 9.94A. Assuming a mandatory 20 year sentence for one count of premeditated murder, SRA sentencing could result in release at or before the quite viable age of 64 when credit for time served is awarded. RCW 9.94A.533, .540(1), .589. An age when the officers he helped murder might have enjoyed active retirements. An age when he may remain fit enough to murder more people. A chance for freedom at or before 64 is a significant departure from the pre-dismissal status quo of guaranteed death behind bars if only one of the well supported RCW 10.95 aggravating factors were found.

Defendant's self-centered focus on how likely he is to survive less severe sentences also grossly ignores the impact of the dismissal beyond

this case; specifically, the societally important loss of the right to seek one of the two most severe sentences available under law against a person who there is at least probable cause to believe singled out for murder representatives of the government on which all our residents rely for protection of their lives, liberty, and property. RCW 10.95.020; ***United States v. Gardner***, 107 F.3d 1314, 1320 (9th Cir. 1997)(citing U.S. Const. Amend. X); ***Southcenter v. Nat'l Dem. Pol. Comm.***, 113 Wn.2d 413, 421-22, fn.14, 780 P.2d 1282 (1989)(citing U.S. Const. preamble). Because those sentences are designed to punish as well as deter those who would follow in his footsteps, the capacity to secure mandatory life sentences has significant far-reaching consequences. Especially in these turbulent times when too many perceive premeditated attacks on police to be a legitimate form of political speech.[2]

Despite defendant's feigned or, worse, actual lack of appreciation for why the premeditated murder of police deserves more punishment than murder in general, RCW 10.95's enactment reveals our Legislature has no trouble with the distinction. And why would it since police have

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[2] "[I]n the last decade, more than half a million ... were assaulted in the line of duty. More than 160,000 were injured, and 536 were killed—the vast majority while performing routine ... tasks ...." ***Gonzalez v. City of Anaheim***, 747 F.3d 798, 803-04 (9th Cir.2014) (citing ***Mattos v. Agarano***, 661 F.3d 433, 453 (9th Cir. 2011) (Kozinski, concurring and dissenting in part)). "Shooting deaths of law enforcement spiked 78 percent in the first half of 2016 compared to last year, including an alarming increase in ambush-style assaults .... That's a very alarming, shocking increase in the number of officers who are being literally assassinated because of the uniform they wear and the job they do...." http://www.foxnews.com/us/2016/07/27/shooting-deaths-lawenforcement-spike-in-2016-report-reveals.html; ER 201.

historically proved essential to the social order on which all else depends. Law itself has little claim to existence beyond those willing *and physically able* to give it force. *E.g.*, ***Cooper v. Aaron***, 358 U.S. 1, 78 S.Ct. 1401 (1958) (troops needed to enforce desegregation decree); ***State ex rel. Brotherton v. Blankenship***, 157 W.Va. 100, 114, 207 S.E.2d 421 (1973) (*quoting* Federalist Papers No. 78: "The judiciary ... must ...depend upon ... the executive arm even for the efficacy of its judgments.").

From the perspective of a man previously convicted of murdering two people in Arkansas, now accused of murdering four police officers in Washington, who only has one life to give for those he most recently took, there may be no practical difference between a mandatory life sentence for an RCW 10.95 aggravator and the most severe of the lesser sentences that survived the ruling challenged here.[3] But for the families of the fallen and the society those officers represented, *only* a RCW 10.95 aggravator can secure the sentence defendant deserves. Depriving the public its right to pursue that sentence is a status quo altering freedom of action seized by an unsound ruling this Court can and should correct.

[3] It appears to be in this context *former* Deputy Prosecuting Attorney Stephen Penner referred to the difference between the two sentences as "academic," which was an inartful, apparently extemporized, remark that has no bearing on the merits of granting interlocutory review or correcting the trial court's erroneous dismissal of defendant's RCW 10.95.020(1) sentencing factors. RP(8/7) 11-12; https: // www.mywsba. Org / Law yerDirectory/LawyerProfile.aspx?Usr_ID=25470; ER 201.

2. DEFENDANT'S TIME-BARRED INVOCATION OF COLLATERAL ESTOPPEL TO PREVENT CORRECTION OF THE DISMISSAL OF HIS RCW 10.95 SENTENCING FACTORS IS MERITLESS DUE TO THE ABSENCE OF A FINAL JUDGMENT OR UNANIMOUS SPECIAL VERDICT AGAINST THOSE FACTORS TO WHICH THAT COMMON LAW DOCTRINE OF JUDICIAL ECONOMY COULD APPLY.

Collateral estoppel is a common law doctrine designed to conserve judicial resources through finality. ***State v. Dupard***, 93 Wn.2d 268, 272, 609 P.2d 961 (1980). As a tool of public policy, it may be qualified or rejected whenever it frustrates public policy. It should never be applied to defeat the ends of justice. ***Reninger v. State Dep't of Corr.***, 134 Wn.2d 437, 451, 951 P.2d 782 (1998); ***State v. Williams***, 132 Wn.2d 248, 253, 937 P.2d 1052 (1997); ***Henderson v. Bardahl Int'l Corp.***, 72 Wn.2d 109, 119, 431 P.2d 961 (1967). So the doctrine cannot be legitimately invoked to confound our Legislature's unmistakable policy preference for accurate sentences despite the cost of relitigation, which is expressed through the legislative support for retrial of noncapital sentencing factors the State failed to prove at an original sentencing. *See* ***State v. Cobos***, 178 Wn.App. 692, 701, 315 P.3d 600 (2013) *aff'd* 182 Wn.2d 12, 16, 338 P.3d 283 (2014); ***State v. Nunez***, 174 Wn.2d 707, 717-18, 285 P.3d 21 (2012); ***State v. Bergstrom,*** 162 Wn.2d 87, 96-98, 169 P.3d 816 (2007); *see also* ***Monge v. California***, 524 U.S. 721, 730, 734, 118 S.Ct. 2246 (1998).

a. This court should not revisit the ruling that precluded from review defendant's argument collateral estoppel bars relitigation of his aggravating factors for he did not timely move for modification.

"If an aggrieved party fails to seek modification ... within the time permitted by RAP 17.7, the ruling becomes a final decision of this court." ***Broer***, 93 Wn.App. at 857, ***Gould***, 37 Wn.App. at 758. Such a ruling should stand. *Id.*; ***Hough***, 108 Wn.App. at 27; RAP 17.7; 2A Wash. Prac., RAP 2.3 (7th ed.); 3 Wash. Prac., RAP 17.7 (7th ed.).

In footnote No. 1 of the ruling granting review, the Court refused to permit discretionary review of defendant's collateral estoppel claim as it was not a basis for the dismissal challenged through RAP 2.3. Failure to timely seek modification of the ruling as RAP 17.7 requires made the exclusion of his collateral estoppel claim a final decision of this Court. He cannot invoke RAP 2.5 to revive the claim, as RAP 2.5 permits this Court to forgive his failure to raise collateral estoppel below. It does not excuse his failure to seek modification of this Court's rulings under RAP 17.7.

b. Collateral estoppel cannot be used by defendant to bar reinstatement of his RCW 10.95 sentencing factors for doing so would rank judicial economy over the legislature's expressed preference for accurate sentencing and there is no final judgment or unanimous verdict to which that common law doctrine of judicial economy could apply.

"[C]ollateral estoppel does not apply ... to resentencing after the original sentence was reversed." ***State v. Amos***, 147 Wn.App. 217, 232, 195 P.3d 564 (2008)(citing ***State v. Harrison***, 148 Wn.2d 550, 561-62, 61 P.3d 1104 (2003)) *abrogated on other grounds*, ***State v. Hughes***, 166 Wn.2d 675, 681 fn.5, 212 P.3d 558 (2009). "The Supreme Court has held ... the prosecution's admitted failure to prove an aggravating circumstance beyond a reasonable doubt does not preclude retrial of that allegation at a new sentencing proceeding, except in the context of death penalty cases." ***Nunez***, 174 Wn.2d at 718.

Our Legislature has made clear it perceives public policy to be best served by the imposition of accurate sentences even where that accuracy comes at the cost of repetitive litigation. ***Cobos***, 182 Wn.2d at 15; *see also* ***State v. Thomas***, 166 Wn.2d 380, 94, 208 P.3d 1107 (2009); ***State v. Eggleston***, 164 Wn.2d 61, 71, 187 P.3d 233 (2008); ***State v. Benn***, 161 Wn.2d 256, 263-64, 165 P.3d 1232 (2007). The "doctrine of collateral estoppel is embodied in the ... guaranty against double jeopardy." ***Williams***, 132 Wn.2d at 253 (citing ***Ashe v. Swenson***, 397 U.S. 436, 445-46, 90 S.Ct. 1189 (1970)). In that context the doctrine "means simply that

when an issue of ultimate fact has ... been determined by a valid and *final judgment*, that issue cannot again be litigated between the same parties in any future lawsuit." *Id.* (quoting ***Ashe***, 397 U.S. at 443)(emphasis added).

Vacated judgments are not final judgments, which is why "collateral estoppel can be defeated by later rulings on appeal." ***State v. Harrison***, 148 Wn.2d 550, 560-61, 61 P.3d 1104 (2003). "[C]ollateral estoppel does not apply [where] the original sentence no longer exits as a final judgment on the merits." *Id.* Retrial following a conviction's reversal on appeal or mistrial is a continuation of the original action, making such a case devoid of the finality on which the doctrine depends. ***Harrison***, 148 Wn.2d at 560-61; ***State v. Buchanan***, 78 Wn.App. 648, 652, 898 P.2d 862 (1995); ***State v. Clemons***, 56 Wn.App. 57, 61, 782 P.2d 219 (1989).

For collateral estoppel to preclude relitigation of an issue, each of the following requirements must be met:

> (1) The issue in the prior adjudication must be identical to the issue currently presented for review; (2) The prior adjudication must be a final judgment on the merits; (3) The party against whom the doctrine is asserted must have been a party to or in privity with a party to the prior adjudication; and (4) barring the relitigation will not work an injustice on the party against whom the doctrine is applied.

Harrison, 148 Wn.2d at 561. Yet "the United States Supreme Court has itself applied policy considerations in refusing to apply collateral estoppel in a criminal context." ***State v. Cleveland***, 58 Wn.App. 634, 642-43, 794 P.2d 546 (1990)(citing ***Standefer v. United States***, 447 U.S. 10, 21, 100

S.Ct. 1999 (1980)). The doctrine arose in the context of civil cases as a way to promote judicial economy and to conserve private resources. But considerations in civil matters differ from the criminal context where the State "is often without a full and fair opportunity to litigate because of discovery limitations, [] lack of remedial appellate procedures if a defendant is acquitted, and the exclusionary rule." *Id.* "In addition, jury verdicts may be the result of passion or prejudice, and as such, without remedial appellate procedures...." *Id.*

Compelling public policies addressed through the criminal code can also support refusal to apply the doctrine. ***State v. Barnes,*** 85 Wn.App. 638, 652-53, 932 P.2d 669 (1997). Although the judicial economy facilitated through the doctrine's application is important, the "purpose of the criminal code is to protect the community from conduct that inflicts or threatens substantial harm to individual or public interests. ... It does so, in part, by incarcerating the perpetrator. The community also has an interest in promoting respect for the law by providing just punishment." *Id.* (citing RCW 9A.04.020(1)(a); RCW 9.94A.010(2), (4)). So the doctrine must yield when enforcement interferes with these higher societal aims.

At the first trial, *only* these two questions with instructions on how to respond were posed about the RCW 10.95 aggravating circumstances:

> QUESTION #1: Has the State proven the existence of the following aggravating circumstance beyond a reasonable doubt?

> The victim was a law enforcement officer who was performing his or her official duties at the time of the act resulting in death and the victim was known or reasonably should have been known by the defendant to be such at the time of the killing.
>
> ANSWER #1:_____ (Write "yes" or "no." **"Yes" requires unanimous agreement**)
>
> QUESTION #2: Has the State proven the existence of the following aggravating circumstance beyond a reasonable doubt?
>
> There was more than one person murdered and the murders were part of a common scheme or plan or the result of a single act of the person.
>
> ANSWER#2: _____ (Write "yes" or "no." **"Yes" requires unanimous agreement**)

CP 27, 35-38 (emphasis added). The jury answered each question "no." CP 35-38. On remand, the trial court misinterpreted those answers as acquittals. RP (8/7/15) at 6-7, 14. Yet the only fact communicated by a "no" answer is disagreement about whether the answer was "yes."

Herein lies a fatal flaw in defendant's assertion "[t]he jury entered a unanimous "No" verdict regarding the aggravating [factors] in the first trial." Resp.Br. at i. An expression of disagreement does not communicate unanimous rejection of the aggravators, much less assert they were proven false or nonexistent. Restated in terms of simple logic, it is the material difference between: "at least one could not find X," and "none could find X," or "Not X," or "X is false."

The disagreement expressed through the special verdicts proves nothing more than the jury was hung, which could not even serve to bar retrial of base offenses to which double jeopardy applies. Nothing in the verdicts supports defendant's claim all 12 jurors unanimously decided the RCW 10.95 factors "against the State." If the jurors actually harbored such an opinion, it existed beyond the verdicts, making it part of "thought processes [which] inhere in the verdict[s] [, so] cannot be used to impeach [them]." ***Breckenridge v. Valley Gen. Hosp.***, 150 Wn.2d 197, 204, 75 P.3d 944, 949 (2003). Defendant cites to juror polling to support his mischaracterization of the special verdicts; however, polling only confirmed "no" answers to special verdict questions *actually posed*; the responses did not provide insight into how questions never posed might have been answered.

Even entertaining unfounded assumptions of unanimous agreement the RCW 10.95 aggravators were not proved, such a finding could not support their dismissal under double jeopardy or collateral estoppel as special verdicts communicating: "none could find X" are insufficient to bar relitigation of sentencing factors. Still biding Supreme Court precedent provides: "The prosecution's admitted failure to prove an aggravating circumstance beyond a reasonable doubt does not preclude retrial of that allegation at a new sentencing proceeding, except in the context of death penalty cases." ***Nunez***, 174 Wn.2d at 718. "Accordingly, whether a jury

unanimously rejected an aggravating circumstance has no bearing on whether the factor may be retried outside of the death penalty context." *Id.*

Further assuming public policy could abide invocation of collateral estoppel to preclude retrial of RCW 10.95 aggravators in noncapital cases, issue preclusion requires more than a failure of proof. Issue preclusion depends on the existence of a final verdict against the aggravators, which is to say a finding they did not exist or were not true, *i.e.*: "Not X" or "X is false." Only then could it be accurately said their existence or truth had been finally determined. *See* ***Harrison***, 148 Wn.2d at 560. But since the special verdicts returned in defendant's now vacated judgment did not find against the existence or truth of the RCW 10.95 factors, there is no decision against them to which collateral estoppel could apply, assuming the doctrine did apply to bar retrial of sentencing factors despite the Legislature's unmistakable preference for accurate sentencing.

3. NONCAPITAL SENTENCING FACTORS ARE NOT BASE-OFFENSE ELEMENTS TO WHICH DOUBLE JEOPARDY APPLIES. OUR STATE SUPREME COURT ALREADY RULED THERE IS NO SUPPORT FOR DEFENDANT'S CLAIM TO THE CONTRARY IN THE TRIAL-RIGHT CASES ON WHICH THAT CLAIM DEPENDS.

Defendant invites this Court to affirm dismissal of his RCW 10.95 noncapital sentencing factors through recycled arguments our Supreme Court rejected as "semantics [that] assign [] unsupportable weight to [the ***Apprendi*** line of cases'] use of the term 'element' to describe sentencing

factors" because "[none] of [those cases] concern the double jeopardy clause." ***State v. Kelley***, 168 Wn.2d 72, 81-82, 226 P.3d 773 (2010)(citing ***Apprendi v. New Jersey***, 530 U.S. 466, 20 S.Ct. 2348 (2008); ***Ring v. Arizona***, 536 U.S. 584, 122 S.Ct. 2428 (2002); ***Blakely v. Washington***, 542 U.S. 296, 124 S.Ct. 2531 (2004)). ***Alleyne*** only extended the Sixth Amendment trial right and Fourteenth Amendment standard of proof cases to minimum penalty factors. ***Alleyne v. United States***, ___ U.S. ___, 133 S.Ct. 2151 (2013). There is nothing in ***Alleyne*** capable of supporting defendant's assertion it *sub silentio* abrogated binding double jeopardy precedent without so much as citation to the right against double jeopardy or the Fifth Amendment where the right is found, or analysis explaining the compelling justification underlying the departure from *stare decisis*.

Defendant urges this Court to engage in strange-legal alchemy, where the jury trial right of the Sixth Amendment transforms through combination with an attending Fourteenth Amendment standard of proof into a Fifth Amendment double jeopardy protection rejected by precedent interpreting the Double Jeopardy Clause. Nothing short of chaos would ensue if the incremental development of each right through narrow grants of *certiorari* was abandoned in favor of defendant's approach of defining the contours of constitutional rights through cases that do not mention them. Still, defendant somehow feels comfortable arguing the Supreme Court of the United States of America really intended to radically rewrite the Fifth Amendment double jeopardy precedent it purposely crafted

eighteen years ago in ***Monge v. California***, 524 U.S. 721, 118 S.Ct. 2246 (1998), by articulating a vague "broader principle" in ***Alleyne*** without so little as a citation to ***Monge,*** double jeopardy, or the Fifth Amendment.

One need not rank among constitutional scholars to appreciate the flaw in defendant's odd approach to interpreting constitutional rights. A decade before ***Monge***, the United States Supreme Court reiterated that "[w]here a particular [A]mendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment ... must be the guide for analyzing" claims pertaining to such conduct. ***Graham v. Connor***, 490 U.S. 386, 394, 109 S. Ct. 1865 (1989). Adherence to this standard has already compelled the Washington Supreme Court to refrain from reading into ***Alleyne*** more meaning than the case's explicit, exceedingly limited, holding could bear.

The same year the Court decided ***State v. McEnroe***, 181 Wn.2d 375, 378-79, 333 P.2d 402 (2014), it also decided ***State v. Witherspoon***, 180 Wn.2d 875, 891, 329 P.3d 888 (2014), which is another case where another criminal defendant attributed more meaning to ***Alleyne*** than it can bear. Unlike defendant, who advocates giving ***Alleyne*** implied meaning across Amendments, Witherspoon far more conservatively, nonetheless incorrectly, urged extension of ***Alleyne***'s Sixth Amendment holding to a Sixth Amendment protection it did not explicitly reach. Our Supreme Court rightly refused to give ***Alleyne*** extra-textual implied meaning, even within the sphere of Sixth Amendment jurisprudence it occupies:

> Earlier this year, the United States Supreme Court again considered which facts must be proved to a jury under the Sixth Amendment if such facts may increase a criminal sentence. *Alleyne,* —— U.S. ——, 133 S.Ct. 2151.... The Court held that any fact that increases a mandatory minimum sentence for a crime is an element of the crime that must be submitted to the jury. *Id.* at 2155. Witherspoon argues that under *Alleyne*'s reasoning, prior convictions must be proved to a jury beyond a reasonable doubt before they can be used to enhance a sentence. This is, however, incorrect. Like *Blakely,* **nowhere in *Alleyne* did the Court question *Apprendi's* exception for prior convictions. It is improper for us to read this exception out of Sixth Amendment doctrine unless and until the United States Supreme Court says otherwise**. ...

Witherspoon, 180 Wn.2d at 891 (emphasis added). It is inconceivable the State Supreme Court would find it "improper" to read ***Alleyne*** as expanding Sixth Amendment doctrine beyond its explicit Sixth Amendment holding, yet nevertheless find it proper to read it as overturning 18 years of United States Supreme Court Fifth Amendment double jeopardy precedent on which the nation and the several states rely in the administration of their criminal law.

Defendant's reading of ***Sattazahn v. Pennsylvania***, 537 U.S. 101, 123 S.Ct. 732 (2003) as extending double jeopardy protections to RCW 10.95 sentencing aggravators in noncapital cases is similarly problematic. ***Sattazahn*** addressed death penalty sentencing factors to which double jeopardy applies. ***Bulington v. Missouri***, 451 U.S. 430, 101 S.Ct. 1852 (1981); ***Monge***, 524 U.S. at 729. ***Sattazahn*** held a jury's rejection of *all*

death penalty factors precludes resubmittal; however, if one is found, even those rejected can be resubmitted. *Id.* at 112; ***Poland v. Arizona***, 476 U.S. 147, 149, 106 S.Ct. 1749 (1986). ***Sattazahn***'s holding does not apply to defendant's noncapital case where no death penalty factors are alleged. ***Monge***, 524 U.S. at 729; ***State v. Powell***, 167 Wn.2d 672, 223 P.3d 493 (2009) (*overruled on other grounds by* ***State v. Siers***, 174 Wn.2d 269, 274 P.3d 358 (2012)); ***Benn***, 161 Wn.2d at 262-64.

C. CONCLUSION.

This Court should correct the trial court's clear error of law by reinstating defendant's noncapital RCW 10.95 sentencing factors, so a jury can decide if he helped murder four police officers under circumstances warranting a mandatory life sentence. Binding precedent lines up squarely against each reason he offers in support of allowing the error to stand. His challenges to the ruling that granted review and excluded his meritless invocation of collateral estoppel are time barred under RAP 17.7. Only the

United States Supreme Court can overturn its binding decision that double jeopardy protections do not extend to noncapital sentencing factors.

RESPECTFULLY SUBMITTED: November 1, 2016

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WSB # 38725

Certificate of Service:
The undersigned certifies that on this day she delivered by ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

11/1/16 _____
Date Signature

PIERCE COUNTY PROSECUTOR

November 01, 2016 - 3:25 PM

Transmittal Letter

Document Uploaded: 1-483840-Reply Brief~2.pdf

Case Name: State v. Darcus Allen
Court of Appeals Case Number: 48384-0

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Reply__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Heather M Johnson - Email: hjohns2@co.pierce.wa.us

A copy of this document has been emailed to the following addresses:

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